obtained a lesser amount than they could have obtained for the sale of the project, such negligence or omission does not provide a triable issue in the action by the consortium against the defendants.

Now the said letter AMB-1 and the affidavit of Phan Foo Beam encl. (41) in the Court file show that when the original offer for the purchase by Tunku Yaacob Holdings Sdn. Bhd. of the project was made, it was subject to their own 23.5% and was made largely consistent with a C.H. Williams forced sale valuation of the unsold portions of the project as at 27 July 1988. When the negotiations came to naught the Receivers & Managers advertised for the sale of the project in the New Straits Times and in the Singapore Straits Times. They also notified all the directors of the 1st defendant (who are the guarantor defendants here) to submit any offer they may have or of any party that they could bring in. Apparently none of the defendants could or did come up with any offer and it was in that background that the Receivers & Managers had to make their counter-offer to Tunku Yaacob Holdings Sdn. Bhd. of RM 13 million. Having in mind the said valuation as at July 1988 and looking at the other valuations that have been brought to the attention of the Court, and having in mind that the sale was only in respect of the unsold portions of what in effect could be regarded as an abandoned or suspended project and was subject to the rights of the 66 or so subpurchasers, and having in mind that the purchaser owned 23.5% of the project and that any sale of it would be subject to its 23.5% interest, the contention that the sale was completed negligently or in any event at an undervalue, can be found without a trial to be without merit as I find it to be. It does not provide a *bona fide* triable issue.

The appeal has to be and is dismissed with costs.

OTHMAN BIN HAJI ABDUL HALIM

v.

HAMISAH BT AWANG

HIGH COURT, PENANG
TUAN T. SELVENTHIRANATHAN JC
[CIVIL APPEAL NO. 11-32-91]
20 JANUARY 1994

FAMILY LAW: Paternity suit - Application for maintenance of an illegitimate child - Appellant disclaiming paternity - Whether appellant genetically linked to the child.

EVIDENCE: Paternity suit - Determination of genetical relationship - Deoxyribonucleic Acid (DNA) test - Preconditions for test not fully satisfied - Finding of test not unqualified - Whether evidence thereof admissible.

The respondent, who claimed to have given birth to an illegitimate child as a result of an illicit liasion with the appellant, filed a maintenance suit against the appellant through the aid of the Legal Aid Bureau. The appellant denied and disclaimed paternity of the child but the Magistrate found otherwise and on 31 May 1991, ordered the appellant to pay a monthly maintenance of RM200. The appellant hence appealed.

Prior to the hearing of the appeal, both parties agreed, with the consent of the Court, to undergo a Deoxyribonucleic Acid test (DNA test) to determine the genetical relationship of the parties to the child, particularly that of the appellant, and it was agreed further that whatever the result might be, it would be binding on them both. In consequence, a DNA test was conducted on the parties, based on methods prescribed in a 1985 medical publication, by one Prof. Dr. Shaharuddin of the National University Malaysia, who, while coming out with a qualified finding pursuant to the test, had strongly suggested that a second opinion be sought elsewhere. The respondent refused to be bound by the result on the grounds that the requisite procedures for the test had not been followed and that the result was inconclusive and hence inadmissible.

Held:

[1] The DNA Profiling Analysis Report was inadmissible because it was not unqualified and all the test conditions which had been set down

had not been followed to the letter. For the DNA profiling to be properly carried out, all the four specified parties i.e the purported father, the mother of the child, the child and another family member of the purported father, preferably an uncle of the child on the paternal side, had to be present and tested. This had not been done resulting in the test result being inconclusive and therefore inadmissible.

[2] The Court takes judicial notice of the fact that tremendous progress has been and is continually being made in the field of DNA profiling analysis and it may well be that the method described in the 1985 publication which Dr. Shaharuddin used may not be the latest method available. That may in fact be the reason why Dr. Shaharuddin strongly advised the seeking of a second opinion.

[DNA Profiling Analysis Report ruled inadmissible. Appellant's application for leave to appeal to Supreme Court granted].

For the appellant - Darshan Singh; M/s. Darshan Singh & Co.
For the respondent - Donald Franklin, Legal Aid Bureau

JUDGMENT

T. Selventhiranathan JC:
This appeal arose out of an application for the maintenance of an illegitimate child brought by his mother ("the respondent" in this appeal) against the appellant. The application was filed in the Magistrate's Court, Penang, on 9 July 1984. The respondent contended that out of an illicit liaison between herself and the appellant which took place during 1981 a child was conceived to whom she gave birth on 25 April 1982. The respondent is a handicapped person, being deaf and dumb. It was the case for the respondent that the appellant visited her house to give religious instructions to her late mother (who was paralysed) and during such visits had taken advantage of the respondent.

The application in the Magistrate's Court was heard and finally concluded (after numerous adjournments for various reasons) on 31 May 1991 when the learned magistrate ordered the appellant to pay maintenance of RM200 per month from the date of complaint to the respondent and her child. The appellant appealed against that decision.

A recitation of the chronology of events in the High Court is necessary to put the background to these proceedings in proper perspective.

On 22 April 1992 the appeal was set down for hearing before Mr. Justice Dato' Abdul Hamid bin Haji Mohamed when it was adjourned by consent of the parties in order to have the blood of the appellant, the respondent and the child sent to Singapore for deoxyribonucleic acid tests ("DNA tests") to determine whether the appellant was the child's father. The parties agreed to abide by the outcome of the tests. The Court then adjourned the appeal to a date to be fixed on the application of the parties when the results of the tests became known.

However, since the parties did not apply for the appeal to be fixed for hearing again but as a complaint had been made on behalf of the respondent about delay in the hearing of the appeal, the Court fixed 9 July 1993 for the hearing of the appeal. On that day Encik Darshan Singh for the appellant informed the Court of the consent order made on 22 April 1992 for the DNA tests to be carried out. He also informed the Court that in the proceedings in the Magistrate's Court both parties had agreed to blood tests which had been carried out but the tests had not been conclusive in relation to the paternity of the child. The parties applied for a further order from me that the appellant, the respondent and the child attend at the General Hospital Penang within one week from 9 July 1993 for samples of their blood to be taken for the DNA tests to be carried out. The samples were then to be sent for testing in Malaysia or in Singapore through the General Hospital Penang to ascertain whether the appellant was in fact the father of the child of the respondent, and the results of the tests were to be furnished to the Court and to both parties by the laboratory which carried out the tests. All expenses in connection with the tests were to be borne by the appellant while awaiting the decision of the Court on the appeal. Both parties agreed to accept the results of the tests. Encik Omar bin Salleh, of the Legal Aid Bureau, for the respondent stated, however, that if the tests were not conclusive or could not be carried out for any reason whatsoever, the Court was to proceed to hear the appeal.

I then made a further order in terms of what was agreed upon between the parties and adjourned

the matter to 26 August 1993 to await the results of the DNA tests, or to hear the appeal, if it proved to be necessary.

On 26 August 1993, Encik Darshan Singh applied for an adjournment of the matter on the ground that the DNA tests had not yet been carried out. Encik Donald Franklin, of the Legal Aid Bureau, for the respondent then informed the Court that the appellant had not done anything in the matter to date to pursue with the DNA tests. He had written to Counsel for the appellant on 29 July 1993 and had received a reply only on 24 August 1993. However, he agreed to a short adjournment for the DNA tests to be carried out. The Court then adjourned the matter to 28 October 1993 for hearing.

At this adjourned date the hearing of the appeal had to be further adjourned because Encik Donald Franklin was away outstation on official business (I was so informed by Encik Omar bin Salleh of the Legal Aid Bureau) and was not in Court when the appeal was called. The Court then fixed 30 November 1993 for the hearing of the appeal.

On 30 November 1993, Encik Darshan Singh informed the Court that the DNA tests could be carried out at Universiti Kebangsaan Malaysia and an appointment had been made for all concerned to attend on 10 December 1993. He had been informed that the report of the tests would be ready within one week. Again by consent of the parties the appeal was adjourned to 12 January 1994.

When the appeal came up for hearing on 12 January 1994, Encik Darshan Singh produced a report from Associate Professor Dr. Shaharuddin Aziz of Universiti Kebangsaan Malaysia headed "DNA Profiling Analysis". The relevant parts of the letter accompanying the report read as follows (with the text reproduced verbatim):

> The DNA analysis under our experimental conditions using conventional techniques revealed no biological relationship between the purported father and the 'son'.
>
> You are however strongly adviced to seek a second opinion.
>
> I would like to clarify that all subjects arrived on the same day as scheduled that is on 10 December 1993. However the subjects were treated at different times. This is our own arrangements to avoid contaminations and too many people in the lab which is quite restricted in space.

The report then went on to state as follows (again with the text reproduced verbatim):

> **Conclusion and comments:**
>
> 1. I am of the opinion that under our experimental conditions the DNA profiling analysis appear to indicate no biological relationship existed between Othman bin Mohd Salim and 'Mohd Kamal' (i.e. the child).
> 2. Other probes could be use to further add proof that biological relationship did not exists.
> 3. Brothers should be similarly analysed to demonstrate the concept of identical or matching DNA profile. **In this analysis, the brother of Othman bin Mohd Halim was not available and therefore a 'control' could not be set up** (emphasis added).
> 4. Nevertheless, the DNA patterns of the mother to son comparison demonstrated co-migrating DNA fragments of roughly similar autoradiographic intensity. A small portion of additional weakly hybridizing fragments in son ('S') were matched by strongly hybridizing fragments in mother.
> 5. A repeat of the experiment **using less exhaustive DNA probes** showed non-identical or non-matching DNA fragment pattern between 'F' (i.e. the appellant) and 'S' (see attached photos of autoradiograph)
> (emphasis added).
>
> **Conclusion:** It is always advisable to seek a second opinion.
>
> This is my personal findings and opinion and does not reflect the opinion of the University Kebangsaan Malaysia Faculty of Medicine.

Encik Darshan Singh submitted that the report showed that the appellant was not the father of the respondent's child. This evidence was conclusive and should be accepted although there was the "usual rider" of advice to seek a second opinion. He urged the Court to allow the appeal with costs.

Encik Donald Franklin objected to the admissibility of the report. Dr. Shaharuddin's letter accompanying the report strongly advised the seeking of a second opinion, and the report also concluded with a similar exhortation to seek a

second opinion. In his view it was not safe for the Court to accept the report as the prescribed procedure for carrying out the DNA profiling analysis had not been followed. He referred to a letter from Dr. Shaharuddin to the solicitors for the appellant dated 6 December 1993 which reads as follows (with the text reproduced verbatim):

> Dear Sir
>
> **DNA Profiling**
>
> I refer the above matter and your letters of 15 October 1993 and 26 November 1993. Please be advised that I shall be able to meet your request and to do the test.
>
> Kindly arrange for the family of En Othman bin Haji Abdul Halim namely:
>
> a. The purported father
> b. Mother
> c. The child
> d. And another preferably an uncle 'paternal side'
>
> Please assemble at the Biochemistry Department Medical Faculty, UKM Jalan Raja Muda, Kuala Lumpur on 10 December 1993 at 10 am for blood sampling.
>
> Kindly bring IC or birth certificates.
>
> The cost for the test on a, b, c and d above would be about RM580.
>
> In principle, DNA diagnostics requires identifying whether each parent has passed to a child that fragment of DNA (inherited) from his or her mother or father such that the DNA profile can give unequivocal positive evidence of relationship.
>
> We shall use the routine method described in Nature, Vol. 317, 1985 p. 818, AJ Jeffreys *ettal*.
>
> Thank you.
>
> Yours faithfully
>
> (Sgd)
> .....
> Assoc Prof Dr. Shaharuddin Aziz

Encik Donald Franklin submitted that for the DNA profiling to be properly carried out, all four parties specified had to be present, i.e. the purported father, the mother of the child, the child and another family member of the purported father, preferably an uncle of the child on the paternal side (meaning a blood brother of the purported father). An uncle of the child on the paternal side had not undergone the tests and the finding in the report was therefore not conclusive. That was why Dr. Shaharuddin had advised the obtaining of a second opinion.

Encik Donald Franklin also stated that the Court had ordered that all persons who were to undergo the tests were to attend at the same time to avoid any untoward allegations being made. He had written to the solicitors for the appellant on 27 December 1993 informing them that although the respondent, her child and a member of his staff had continuously attended at the Department of Biochemistry of the Faculty of Medicine Universiti Kebangsaan Malaysia from 10.00 am until 12.30 pm on 10 December 1993, the appellant had not turned up during that time. He informed the solicitors that had the appellant gone to the department subsequently without the Legal Aid Bureau's knowledge they would oppose the result of the DNA tests on the basis that a representative of the respondent had not been present when the blood sample of the appellant was obtained. This was in accordance with the order of the Court which had directed that the representatives of both sides be present when the blood samples were taken. The letter concluded by stating that if the appellant had not yet gone for his test and intended to do so after the receipt of the letter, the Bureau was to be informed so that their representative could attend when the blood sample of the appellant was being taken. If this was not done and if the result of the DNA tests was not in favour of the respondent, it would be opposed. The letter was copied to the Court and to Dr. Shaharuddin.

In the circumstances I ruled that the report headed "DNA Profiling Analysis" was inadmissible because it was not unqualified and all the test conditions which had been set down had not been followed to the letter. In so ruling I bore in mind the requirements set down by Dr. Shaharuddin in his letter of 6 December 1993 relating to the subjects to be produced for the DNA profiling to be carried out. In that letter Dr. Shaharuddin had stated that in principle DNA diagnostics require identifying whether each parent had passed to a child that fragment of DNA (inherited) from his or her mother or father such that the DNA profile could give **unequivocal positive evidence of relationship** (emphasis added). However, on the basis of the tests that he carried out, Dr. Shaharuddin was unable to say that the appellant was definitely not the father of the child which would be the converse of his statement that the DNA

profile could give unequivocal positive evidence of relationship between a child and a parent. It was his opinion that it was extremely remote that the appellant was biologically or genetically related to the child. Paragraph 1 under the heading "Conclusion and Comments" in the report is somewhat guarded (with the text reproduced verbatim):

> 1. I am of the opinion that ... the DNA profiling analysis **appear** to indicate no biological relationship existed between Othman bin Mohd Salim and 'Mohd Kamal' (emphasis added).

Furthermore Dr. Shaharuddin was denied the use of a "control" which could and should have been provided by the appellant in the form of a brother of his. (During the proceedings in Court Encik Darshan Singh confirmed with the appellant to a question by the Court that the appellant has a younger brother available). In this context, it is observed that Dr. Shaharuddin stated in his report that he repeated the DNA patterns of the mother to son comparison in the case of the appellant as well **but used less exhaustive DNA probes** (emphasis added). No explanation was voluntered as to why he had to resort to less exhaustive DNA probes in the purported father to child DNA patterns of comparison.

From the DNA profiling analysis carried out, Dr. Shaharuddin himself strongly advocated the seeking of a second opinion. I also noted that he had said in his letter of 6 December 1993 that the method to be used would be **"the routine method"** described in the book mentioned in the letter (emphasis added). I took judicial notice of the fact that tremendous progress has been and is continually being made in the field of DNA profiling analysis and it may well be that the method described in the 1985 publication which Dr. Shaharuddin used may not be the latest method available and that may be the reason why Dr. Shaharuddin **strongly advised** (emphasis added) the seeking of a second opinion.

Furthermore, as admitted by Encik Darshan Singh, the appellant went to the laboratory after the respondent, the child and the representative of the Legal Aid Bureau had left. His blood sample was taken in their absence. Dr. Shaharuddin's report does not say that he personally took the blood samples from all the subjects or that they were all present at the same time but were dealt with at different times to avoid contamination and too many people being in the laboratory at the same time. If this was so there would have been no need for paragraph 4 of the letter of 27 December 1993 from the Legal Aid Bureau stating categorically that the appellant had made no appearance up to 12.30 pm on 10 December 1993 when the respondent, the child and the representative of the bureau left the laboratory. This was admitted by Encik Darshan Singh, and suggests that Dr. Shaharuddin himself may not have personally extracted the blood samples from the subjects.

For the above reasons, I ruled that Dr. Shaharuddin's report was inadmissible. Having so ruled, I informed the parties that I would proceed to hear the appeal forthwith.

Encik Darshan Singh then applied for leave to appeal to the Supreme Court on the ground that two consent orders had been made for DNA tests to be carried out and that an undertaking had been given by the parties to be bound by the result of the tests. The parties were bound by the undertaking. In the circumstances I granted leave and adjourned the hearing of the appeal pending the decision of the Supreme Court on this appeal against my ruling.